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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER POE, Defendant and Appellant.	B211461 (Los Angeles County Super. Ct. No. GA060813)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rafael A. Ongkeko. Affirmed as modified.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant challenges the sufficiency of the evidence to convict him of counts 1, 3, 9, 11, 15, and 16. He also challenges his conviction of attempted rape (count 15), arguing that he cannot be convicted of both attempted rape and sexual penetration of the same victim by a foreign object (count 14). Finally, appellant contends that the concurrent prison terms imposed for counts 6, 7, 12, 15, and 16 should have been stayed. We agree that the terms imposed for counts 7 and 15 should have been stayed, and we modify the judgment accordingly. However, because counts 2 and 12 charge the same burglary, we vacate the conviction on count 12. We reject appellant's remaining contentions and affirm the judgment as modified.

STATEMENT OF THE CASE

In a 16-count amended information filed May 13, 2008, appellant was charged with the following crimes:

> Count 1: The March 11, 2005 assault upon Lala A. with intent to commit a felony (rape), in violation of Penal Code section 220;[1]
>
> Count 2: The March 11, 2005 first degree burglary of a dwelling occupied at the time by Lala, with the intent to commit larceny and a felony, in violation of section 459;
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> Count 3: The March 11, 2005 first degree residential burglary of the home of Trevor Pawlik, with the intent to commit larceny and a felony, in violation of section 459;

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[1] Unless a misdemeanor is specified, all counts charge felonies.

All further statutory references are to the Penal Code unless otherwise stated.

Count 4: The March 7, 2005 assault upon Firoozeh V. with intent to commit a felony, in violation of section 220;

Count 5: The March 11, 2005 misdemeanor annoying or molesting a child, Nichole M., in violation of section 647.6, subdivision (a);

Count 6: The March 11, 2005, misdemeanor annoying or molesting a child, Gabriela M., in violation of section 647.6, subdivision (a);

Count 7: March 11, 2005 misdemeanor annoying or molesting a child, Ani S., in violation of section 647.6, subdivision (a);

Count 8: The March 11, 2005 misdemeanor annoying or molesting a child, Anet D., in violation of section 647.6, subdivision (a);

Count 9: The March 20, 2004 attempted kidnapping of Carolyn M. to commit rape, in violation of sections 209, subdivision (b)(1) and 664;

Count 10: The March 11, 2005 misdemeanor sexual battery upon Pella G., in violation of section 243.4, subdivision (e)(1);

Count 11: The March 20, 2004 assault upon Carolyn M. with intent to commit a felony (rape), in violation of section 220;

Count 12: The March 11, 2005 first degree residential burglary of the home of Novart A. (erroneously named A. Novart in the information), with the intent to commit larceny and a felony, in violation of section 459;

Count 13: The February 20, 2005 first degree burglary of a dwelling occupied at the time by Renee J. with the intent to commit larceny and a felony, in violation of section 459;

Count 14: The February 20, 2005 sexual penetration by a foreign object upon Renee J. and another person by means of force, violence, duress, menace and fear of immediate, unlawful bodily injury, in violation of section 289, subdivision (a)(1), with a special allegation that the crime was committed during

the commission of a first degree burglary, within the meaning of section 667.61, subdivisions (a) and (d);

Count 15: The February 20, 2005 attempted forcible rape of Renee J., in violation of sections 261, subdivision (a)(2) and 664;

Count 16: The February 20, 2005 assault upon Renee J. with intent to commit a felony (rape, sodomy, oral copulation), in violation of section 220.

In addition, for the purpose of sentence enhancement pursuant to section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i), the information alleged as to counts 1, 2, 3, 4, 9, 11, 12, 13, 14, 15, and 16, that appellant had suffered two prior felony convictions.

Appellant pled not guilty to all counts, and his jury trial commenced July 3, 2008. The jury found appellant guilty as charged in all 16 counts, except count 4, and found true the special allegation as to count 14, that the crime was committed during the commission of a first degree burglary. Because the jury was unable to reach a verdict as to count 4, the court declared a mistrial as to that count, and it was dismissed. The court sentenced appellant to a total prison term of 170 years to life, and he filed a timely notice of appeal.

STATEMENT OF THE FACTS

In this part, we summarize the facts pertaining to the counts that appellant has challenged.[2] The counts challenged as unsupported by substantial evidence are counts 1, 3, 9, 11, 15, and 16, and involve victims Lala, Pawlik, Carolyn, and Renee. We also summarize the facts relating to counts 6, 7, and 12 that are necessary to discuss appellant's argument that the trial court erroneously imposed concurrent sentences.

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[2] Because appellant has challenged the sufficiency of the evidence, we summarize the facts in the light most favorable to the jury's verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

A. *Counts 1, 2, and 12: Lala A. and Novart A.*

On March 11, 2005, at approximately 3:00 p.m., Lala arrived home, where she lived with her mother, Novart. Lala entered through the front door, which she closed but did not lock. As she placed her purse on the kitchen counter, she saw her mother, said "Hello," and then saw the front door open and appellant's head peek in. Appellant entered uninvited and said, "Did someone call for me?" Lala replied, "No. Who are you?" Appellant then asked, "Are you Lailani?" When Lala said, "You mean Lala?" appellant replied, "No, Lailani. You called for me." Lala said, "No," but appellant came farther inside, closed the door behind him, and said something like, "You called for an exotic dancer." Lala had not called for an exotic dancer. She cursed at him, told him to get out, and picked up the phone to call 911 while appellant gyrated and exposed himself.

Lala said, "Go back," and placed herself between her mother and appellant. Lala's mother panicked, screamed, and ran out the back door. Appellant approached Lala with his pants down and his genitals exposed, while he touched himself. Appellant then grabbed Lala, leaving red finger marks on one arm, but Lala freed herself and ran out and into the backyard with her mother. Appellant followed her outside, but when Lala's beagle attacked his feet, he ran back into the house and out the front door.

B. *Count 3: Trevor Pawlik*

On the afternoon of March 11, 2005, Edvin Keshishian heard screaming in his neighborhood. When he heard his father yell, "Help," he ran outside to assist and saw a man dressed in khaki shorts running toward Foothill Boulevard. Keshishian, his father, and his brother chased the man, whom Keshishian later identified in court as appellant. When appellant crossed Foothill, Keshishian turned back to get his car, called his mother, telling her to call the police, and then drove around looking for appellant. When someone told him that appellant had jumped a fence into a residential yard on Creemore

Place, Keshishian and his brother placed themselves on either side of house and waited for the police.

Trevor Pawlik testified that he resided on Creemore Place. On March 11, 2005, he locked all doors before leaving for work at approximately 8:00 a.m. When Pawlik returned from work between 7:00 and 8:00 p.m., he opened the garage and Kobe, one of his two dogs, emerged from it. Pawlik always secured his dogs in a separate fenced area when he left them, denying them access to the garage and the backyard pool. Pawlik observed that Kobe was wet, as though she had been in the pool. Pawlik had not given anyone permission to be in his yard. Moments later, neighbors came over, and one said that he had missed the excitement caused by many police officers and a helicopter in the neighborhood.

Pawlik then entered his house from the back door into the laundry room, and he noticed that some knobs were off the cabinets. In the kitchen a juice carton, usually stored in the refrigerator, was on the counter. In the refrigerator, the foil had been pulled back from a defrosting chicken. In the bedroom, the bed was ruffled instead of "pristine" as he had left it that morning. Near the dressing table, there was dirt on the floor and paper strewn about. Things looked out of place. A razor had been removed from the vanity and placed on the bathroom counter, and a bar of soap with hair on it was on the shower floor. Pawlik had not left it that way; he always cleaned the soap and put it back in the soap dish.

Pawlik called the police. When the officers came, they showed him a shirt they had recovered from appellant, and Pawlik recognized it as his own. The officers also showed him a set of navy blue fleecy sweats, which he also identified as his own. Pawlik had not given anyone permission to take his clothes. He then looked in his laundry hamper, found tan shorts that were not his, and gave them to the police.

One of Pawlik's neighbors, Kraig Vanerklomp was working at home on March 11, 2005, and at approximately 3:00 p.m., he heard that someone had been assaulted a few

blocks away. He went outside to keep an eye out for anyone unfamiliar to the neighborhood, and when he saw appellant on the porch of Pawlik's house, he videotaped him. Appellant had been inside Pawlik's house that afternoon for about two hours before the police brought him out around 6:00 p.m.

C. *Counts 6 and 7: Gabriela M. and Ani S.*

Anet D. testified that she was 10 years old on the day in question. She went to the school restroom on March 11, 2005, accompanied by her close friend Ani. She saw shoes under a closed stall door and recognized them as those of another girl, Gabriela. While Anet spoke to her sister on her cell phone, appellant, who was a stranger to Anet, entered the restroom. Appellant dropped his pants, which resembled pajama bottoms, and revealed his underwear. His underwear was black and appeared to be women's underpants with straps on the sides. In a threatening tone, appellant asked approximately four times, each time louder, "Are my panties wet?" The underwear provided full coverage, and did not reveal his genitals or buttocks. Appellant's backside faced the mirror, and he turned to look at it while he asked whether his panties were wet.

Appellant then went into a stall for a few seconds without locking it, just as Gabriela emerged from hers. When appellant came back out, his pants were up, but he pulled them down again and continued to ask whether his panties were wet. A moment later, Anet looked around and noticed that Gabriela and Ani were no longer there. Anet looked outside and saw the other girls urging her to come with them. As she began to walk out, appellant extended his right arm and attempted to touch her shoulder. Anet then ran to tell a teacher what had happened.

Gabriela testified that on March 11, 2005, when she was in the fifth grade, she went alone to the school restroom. When she came out of a stall, two other girls, Ani and Anet, were in the restroom. A moment later, appellant emerged from a stall, pulled down his sweatpants, and revealed his underwear, which were ladies' black underpants. As he

looked at his behind in a mirror, appellant asked whether his panties were wet. Ani and Gabriela left immediately. Gabriela did not see when appellant or Anet left the restroom. Ani did not testify.

D. *Counts 9 and 11: Carolyn M.*

On March 20, 2004, Carolyn was walking her cousin's Pekinese dog by herself on Sunshine Drive, in a quiet neighborhood. As she walked, she saw two neighbor women gardening in front of their home. Then Carolyn saw an unfamiliar car, a gray Toyota. The Toyota stopped and a man she identified as appellant opened the door, jumped out, and ran toward her. As he approached her, he pointed and said, "Look down, my grandma lives down there." Appellant then grabbed Carolyn from behind, held her in a "bear hug" with his left arm over her chest, placed his right arm between her legs, and tried to lift her. He did not touch her breasts, but held her vaginal area when he tried to lift her. Unable to lift her, appellant began dragging her to his car. He managed to move her about 10 feet.[3]

As she yelled for help, appellant said, "No, no. Come on. Come on." She tried to resist, but the dog[4] became very frightened and ran around, causing the leash to "lock" her fingers and impede the movement of her hands. She remained in appellant's grasp for about two or three minutes, until an approaching white truck caused him to let her go

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[3] Carolyn was not very good at estimating distances. At first, she testified that the car was parked about eight to 10 feet away from her original position and that he moved her about halfway to the car. Asked to demonstrate the distance by comparing points in the courtroom, Carolyn estimated the distance to his car was about from the witness stand to the back wall of the courtroom. When told that distance was 30 feet, she reconsidered and testified that it was from the witness stand to the dividing gate, which was about 20 feet. She concluded that he had dragged her for eight to 10 feet toward his car.

[4] Carolyn still held the leash looped over her wrist and wrapped around her hand.

and flee in his car, which he had left running during the attack. Carolyn said, "Help me. Help me," as appellant sped away, followed by the truck.[5]

When Carolyn turned to run back toward her cousin's house, she was approached by one of the two neighbors she had seen gardening on Sunshine Drive. The neighbor drove her car to help Carolyn after observing the incident, and she drove her to her cousin's house. By that time, the police had arrived. Approximately one year later, Detective McEntarffer showed her six photographs from which she chose appellant's photograph and identified him as her attacker.

E. ***Counts 15 and 16: Renee J.***

When Renee awoke Sunday morning, February 20, 2005, she threw on some sweats and drove to Starbucks for coffee. She stayed there about 45 minutes reading the newspaper. Soon after returning home, she went out to a common-area terrace to smoke a cigarette, closing the door to her apartment behind her but not locking it. Five minutes later, she returned to her apartment, put on some music, washed dishes for about 20 minutes, and then went into the bathroom. Without turning on the light, she pulled down her pants and sat on the toilet. She began to sense someone in the room, in the dark corner behind the door, but before she could process the feeling, a hand covered her mouth, and she heard a man's voice shushing her.

The man, whom Renee later identified as appellant, then emerged and put his mouth all over her face, trying to kiss her while moving his body into hers in an apparent attempt to get on top of her. She struggled to stand up and used her hands to try to fight him off, with much difficulty, since he weighed about 200 pounds. Appellant grabbed her body with one hand and with his other hand holding her external genital area,

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5 Mark Van Loon, the driver of the white truck testified that he searched for the car for 10 or 15 minutes before returning to the scene of the attack.

penetrated her vagina slightly with his fingertips. She pulled herself up, pushed and scratched him, and managed to get him off her.

While Renee fought appellant, she screamed "help" with all her might, over and over, and made "clunking" sounds by hitting the walls. After what seemed like 12 to 15 minutes of struggling, appellant left. Renee ran to the window and opened it, intending to escape through it, but the screen was nailed on. Then she saw appellant standing outside her closed front door where he remained for about two minutes while she continued screaming, "Help, 911, call the police."

When appellant left, Renee ran to her front door and locked it. Then felt she needed someone to help her and ran outside as the neighbors were gathering outside their apartments to see what was wrong. She said to them, "Call 911 right now," and the police arrived very quickly. Soon, search dogs, a helicopter, and news channels arrived, while she sat in shock on the floor, speaking to the officers.

Renee was taken to a hospital with cuts and scrapes all over her face, including a sliced ear. She underwent a two- or three-hour examination, including a gynecological examination, during which the hair on her body was combed and she was photographed undressed. Blood was swabbed from her hands and under her fingernails. Her muscles were sore all over her body, and she could not walk or stand up straight, making her feel crippled. After the examination, Renee returned to her apartment briefly to pack a few things, but she was afraid to stay and never lived there again. Her cuts and bruises took three weeks to heal.

F. *The Investigations*

Detective Darrel McEntarffer testified that the distance between appellant's home, Pawlik's house and Lala's residence was approximately five miles, and that appellant lived approximately a half mile from victims Nichole, Carolyn, and Firoozeh. Detective Steve Castro testified that the distance between Lala's home and the school where the

children were molested was one and one-half miles, and that it took him one minute to drive from Lala's home to Pawlik's house.

Detective Darrel McEntarffer searched the silver Toyota that belonged to appellant's grandmother, and he recovered two pair of women's underwear that appeared to have been worn.

Detective Carla Zuniga, investigating officer in the Renee case, took a buccal swab from appellant on March 27, 2007, assigned it a number – 051508240 – and sent it to Orchid Cellmark Laboratory for analysis. Jody Hynds, a forensic DNA analyst employed by Cellmark, testified that she analyzed the samples taken from appellant and Renee. Hynds explained the process of preserving and analyzing DNA evidence. She determined that appellant's DNA matched the DNA profile in samples taken from Renee's hands.

DISCUSSION

1. *Substantial Evidence Standard of Review*

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.) We do not usurp the province of the jury by reweighing the evidence or resolving conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Thus, we must accord due deference to the jury's resolution of a witness's credibility, and not substitute our own evaluation. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Moreover, unless the testimony is physically impossible or inherently improbable,

testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young*, at p. 1181.)

2. *Count 3: Substantial Evidence of the Burglary of Pawlik's Home*

Appellant contends that his conviction of the burglary of Pawlik's house must be reversed, claiming that there was insufficient evidence that he intended to steal at the time he entered the house.

"Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) "One may be liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.) Evidence of entry with an intent to steal food, make a long-distance telephone call, or even shower, will support a burglary charge, even if taking a shower consumed only a "'miniscule amount' of soap, shampoo and water." (*People v. Martinez* (2002) 95 Cal.App.4th 581, 584-586 (*Martinez*).)

Appellant contends that there was no evidence of his intent when he entered the house. We disagree. "[T]he existence of the requisite intent is rarely shown by direct proof, but may be inferred from facts and circumstances. [Citation.] Evidence of theft of property following entry may create a reasonable inference that the intent to steal existed at the moment of entry. [Citation.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541, citing *In re Leanna W.* (2004) 120 Cal.App.4th 735, 741.) In this case, the jury could reasonably infer from the evidence of appellant's activities in Pawlik's house that he had formed the intent to steal prior to entering. Appellant concedes that the evidence showed that he entered Pawlik's house, took a shower and put on Pawlik's clothing, and that he may have shaved and consumed juice.

Appellant also acknowledges that the intent to steal upon entering may be inferred from the commission of a theft once inside the house. (See *In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 540.) However, he points out that sometimes the facts are insufficient to draw such an inference, such as in *In re Leanna W.*, *supra*, 120 Cal.App.4th 735. He contends that this is such a case. Appellant's reliance on *In re Leanna W.* is misplaced. In that case, although there was evidence that the accused minor entered a residence without consent, and that someone consumed the homeowner's alcohol and used the toilet, there was no evidence that the minor was the person who committed the crime, and no evidence of what she did once she was inside the home. (*Id.* at pp. 741-742.) Here, in contract, there was substantial evidence of appellant's activities in the Pawlik home: no one else was seen with appellant near the house at the time appellant entered; the shower and soap were used that afternoon; and appellant took and wore Pawlik's clothing.

Relying on *Martinez*, *supra*, 95 Cal.App.4th at page 584, appellant contends that the mere commission of petit larceny once inside the house is insufficient, without more, to prove his intent to steal at the time he entered. *Martinez* holds no such thing, but only considered whether the amount of soap, shampoo, and water consumed by the defendant was of sufficient value to qualify as property which may be stolen. (*Id*. at pp. 584-585.) The court concluded that the items were a proper subject of the larceny contemplated by the California burglary statute. (*Id*. at p. 586; see also § 459.)

A defendant's intent at the time of entry may be established with circumstantial evidence, and indeed, is rarely shown by direct proof. (*In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 541.) Appellant invites this court to draw the inference from the circumstances that appellant was merely hiding out and once inside formed the intent to shower and dress in Pawlik's clothing. However, the jury reasonably inferred appellant's intent to steal at the time of entry from substantial evidence that he committed larceny once inside. We must accept the jury's reasonable inferences drawn from substantial

evidence. (*People v. Stansbury* (1995) 9 Cal.4th 824, 831.) Even circumstances that might also reasonably be reconciled with a contrary finding do not render the evidence insubstantial. (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.) We conclude that substantial evidence supports count 3.

3. *Counts 14 and 15: Conviction of Greater and Lesser Offenses*

As part of his substantial evidence argument, appellant contends that he could not lawfully be convicted of attempted rape because he was convicted of the completed offense of sexual penetration. Citing no authority directly on point, he relies upon the following principle: "'If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed.'" (*People v. Cole* (1982) 31 Cal.3d 568, 582, quoting *People v. Moran* (1970) 1 Cal.3d 755, 763.)

We reject appellant's contention. The completed offense to which appellant refers, penetration of Renee with a foreign object, as charged in count 14, is not a lesser included offense of attempted rape, as charged in count 15, but a wholly different crime. (See §§ 261, 289.) A crime is not a lesser included offense unless the greater offense includes all the elements of the lesser. (*People v. Lewis* (2008) 43 Cal.4th 415, 518.) Neither crime is a lesser included offense of the other. The crime of rape requires penetration by a penis, which was not alleged in this case, while penetration by a foreign object excludes penetration by a penis. (§ 261, subd. (a), § 289, subd. (k); *People v. Chambers* (1982) 136 Cal.App.3d 444, 453, fn. 4.) Thus, appellant may be convicted and punished for each criminal act that appellant perpetrated during his attack upon Renee. (See *People v. Harrison* (1989) 48 Cal.3d 321, 334-338.)

4. *Counts 1, 9, 11, 15, and 16: Substantial Evidence of Intent to Commit Rape*

Appellant contends that we must reverse, as unsupported by substantial evidence, counts 1, 11, and 16 (assault with intent to rape Lala, Carolyn, and Renee, respectively), count 15 (attempted rape of Renee), and count 9 (attempted kidnapping of Carolyn with intent to commit rape). He contends that there was insufficient evidence of his state of mind to support a finding that he intended to rape any of his victims. "Conviction of the crime of attempted forcible rape requires proof the defendant formed the specific intent to commit the crime of rape and performed a direct but ineffectual act, beyond mere preparation, leading toward the commission of a rape. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 138, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also § 21a.) An intent to commit rape may be inferred from all of the facts and circumstances surrounding the crime. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130.)

Appellant sets forth the facts of several cases in which the jury's inference of intent was upheld and concludes that the facts in evidence in this case do not support his conviction of counts 1, 11, and 16 because they are not comparable. (See *People v. Rundle, supra*, 43 Cal.4th at pp. 138-139 [victim's body found bound and nude; evidence victim would not have consented to sex]; *People v. Osband* (1996) 13 Cal.4th 622, 692-694 [victim beaten unconscious; awoke with underwear and pantyhose partially removed; defendant made inconsistent statements]; *People v. Wright* (1990) 52 Cal.3d 367, 405 [presence of semen on external genital area of victim supports reasonable inference of rape]; *People v. Nye* (1951) 38 Cal.2d 34, 37 (*Nye*) [attack in victim's bedroom; defendant admitted intent to have sex, not to rape], disapproved on other grounds in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882; *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1155 [victim forced into dumpster enclosure where defendant fondled her breasts and vaginal area and said "I will" in response to companion's remark

that he would not mind getting "a piece of that"], disapproved on other grounds in *People v. Rayford* (1994) 9 Cal.4th 1, 21.)

Appellant's argument suggests that only facts that are comparable to those in the cases cited above will support a reasonable inference of intent to rape. None of the cases cited by appellant support such a suggestion. Moreover, the facts of this case are indeed comparable to at least one of the cited cases. In *Nye*, *supra*, 38 Cal.2d at page 37, the California Supreme Court reasoned: "When a strange man enters a woman's bedroom, covers her mouth with his hand, grasps her wrist while she screams and kicks, releases her when she bites his hand, and makes no effort to take any property, it is reasonable to infer that he intended to commit rape, particularly when such an intent is shown by his attempt to rape another woman under similar circumstances."

The circumstances of appellant's attack on Renee and Lala all resemble to the facts in *Nye*. Appellant -- a stranger to both women -- entered their homes uninvited and assaulted them. Appellant hid in Renee's bathroom until her underpants were down. Then he covered her mouth, and held her with one arm while penetrating her vagina with the fingers of the other hand as she screamed and struggled to free herself. After entering Lala's living room, he continued on to the kitchen toward Lala, even though she told him to leave. He lowered his pants, gyrated, touched his genitals, and then grabbed her hard enough to leave red marks. When she freed herself, he chased her and ran away only after her dog attacked his feet.

We agree with respondent that such facts provided substantial -- indeed, overwhelming -- evidence of appellant's intent to rape Lala and Renee, particularly when the circumstances of the assault of each victim are considered along with those of the other, as the court did in *Nye*, *supra*, 38 Cal.2d at page 37.

We also conclude that substantial evidence supports a reasonable inference that appellant intended to rape Carolyn when he assaulted her. Appellant held Carolyn in a "bear hug," holding her vaginal area as he tried to lift her and drag her toward his car

while she struggled and screamed. Appellant left the car running as he attempted to drag Carolyn to it, and he had covered the license plate. This evidence is particularly compelling when considered in light of the very strong evidence of appellant's intent to rape Renee and Lala. (See *Nye*, *supra*, 38 Cal.2d at p. 37.)

Appellant contends that his behavior showed no more than a "pattern of sexual or fetishistic exposures and sexualized grabbings." However, "it is not the function of this court to determine whether a different finding would be just as reasonable as the one the trial court made; rather, this court simply determines whether there is substantial evidence, including inferences reasonably deduced from the facts in evidence, to support the finding actually made." (*People v. Bard* (1968) 70 Cal.2d 3, 6.) "A judgment will not be reversed unless upon no reasonable hypothesis whatsoever is there sufficient evidence to support the trier of fact's conclusion. . . . [Citations.]" (*Id*. at pp. 4-5.) "'A determination by the court is permissible only when the facts afford no reasonable ground for an inference that the intent existed. [Citations.]' [Citations.]" (*People v. Greene* (1973) 34 Cal.App.3d 622, 649.) As we have concluded that the jury's finding of intent was a reasonable inference from the evidence, we need not consider whether the jury might reasonably have concluded otherwise.

5. *Counts 6, 7, 15, and 16: Concurrent Sentences*

Appellant contends that the trial court erred in sentencing him to concurrent terms on counts 6, 7, 15, and 16. He argues that the child annoying charges in counts 6 and 7 were composed of the same act as charged in count 8, and that the attempted rape of Renee, as charged in count 15, was the same offense as assault upon Renee with intent to commit rape, as charged in count 16. Thus, he contends, the trial court should instead have stayed the prison terms imposed as to the duplicate offenses. He relies upon section 654, which prohibits punishment for two crimes arising from a single, indivisible course of conduct. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) A course of

criminal conduct is indivisible where all the offenses are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18 (*Neal*).)

When a defendant has been sentenced in violation of section 654, the unauthorized sentence must be stayed, and the sentence that provides for the longest term of imprisonment should remain executed. (§ 654, subd. (a).) "A concurrent sentence simply does not satisfy the prohibition against double punishment. [Citations.] Where a trial court erroneously fails to stay terms subject to section 654, the appellate court must stay sentence on the lesser offenses while permitting execution of the greater offense consistent with the intent of the sentencing court. [Citation.]" (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.)

a. *Counts 6 and 7*

Appellant contends that his convictions of misdemeanor annoying or molesting a child, as alleged in counts 6 and 7 (Gabriela and Ani) were the same act as the misdemeanor annoying or molesting a child alleged in count 8 (Anet), and that the trial court should therefore have stayed counts 6 and 7. Respondent contends that child molestation in violation of section 647.6 is a violent crime, because it can cause great harm to the child; thus, the multiple-victim exception to section 654 should apply. (See *Neal*, *supra*, 55 Cal.2d at pp. 20-21.)

Neither party has found authority directly on point. Appellant compares the facts of the misdemeanor molestation of the three girls in this case with the indecent exposure in *People v. Davey* (2005) 133 Cal.App.4th 384 (*Davey*). In that case, the defendant was convicted of two violations of section 314, indecent exposure, after he exposed himself to two minor girls at the same time. (*Davey*, at pp. 391, 394.) The appellate court held that the multiple-victim exception did not apply, because the crime had not been statutorily defined as involving violence to the person, and thus, the punishment for one of the counts should have been stayed. (*Id*. at p. 392.)

The *Davey* court acknowledged "the psychological harm it may have caused to the innocent children [the appellant] chose to victimize", and it did not "in the least intend to condone appellant's despicable behavior." (*Davey*, *supra*, 133 Cal.App.4th at p. 392) However, the court held that because the "crime [was] not statutorily defined as involving violence to the person," the multiple-victim exception did not apply. (*Id*. at pp. 391-392.) We agree that the indecent exposure in *Davey*, at page 391, is comparable to appellant's exposing his underwear in the girls' restroom. It was not a violent crime simply because it caused psychological harm, and the exception does not apply.

Respondent also points out that the first incident Anet and Ani saw was separate from the second incident observed by all three girls. A defendant may be punished for separate and distinct criminal acts arising from a single course of conduct, so long as the defendant's intent and objective were different for each act, even where the acts were closely connected in time. (*Neal*, *supra*, 55 Cal.2d at pp. 19-20.) We agree with respondent that the two incidents of exposure were separate and distinct.

Appellant's intent and objective during the first incident were to engage in offensive conduct toward Anet and Ani. After appellant exposed his underwear to Anet and Ani while asking whether his panties were wet, he went into a stall and pulled up his pants. The exposure had ceased. He came out again and committed a new offense in front of Gabriela. Thus, appellant may be punished for two crimes arising from the course of conduct in the restroom. We shall therefore modify the judgment to order that count 7 be stayed.

b. *Counts 15 and 16*

Appellant contends that the trial court erred in imposing punishment for both count 15, the attempted rape of Renee, and count 16, assault upon Renee with intent to commit rape.

"[A]n assault with intent to commit rape is merely an aggravated form of an attempted rape, the latter differing from the former only in that an assault need not be

shown. [Citation.]" (*People v. Rupp* (1953) 41 Cal.2d 371, 382.) "'An attempt to commit rape by force and violence and an assault with intent to commit rape against the same victim and at the same time are but two different ways of describing the same criminal act.' [Citation.]" (*People v. De Porceri* (2003) 106 Cal.App.4th 60, 68.) When a defendant has been convicted of the two crimes based upon the same facts, he may not be punished for both. (*People v. Liakos* (1982) 133 Cal.App.3d 721, 725; *People v. Ramirez* (1969) 2 Cal.App.3d 345, 354.)

Respondent contends that punishment for both counts 15 and 16 is proper because appellant had separate intents and criminal objectives as to each. Respondent assiduously avoids conceding that the intent in both counts was an intent to commit rape. He suggests that the evidence showed at least three separate sexual assaults, in that appellant attempted to kiss Renee, put his mouth all over her face, grabbed her body, attempted to put his hand in her vagina, put his hand on her genital area, and inserted his fingertips into her vagina. Respondent also argues that the intent and objective of the offense charged in count 16 was different from that in count 15 because it was an assault with intent to commit a felony, i.e., preventing Renee from escaping and notifying the police (an uncharged offense not urged by the prosecution).

Respondent cites *People v. Jimenez* (2002) 99 Cal.App.4th 450, 456, in which the appellate court held that a defendant can lawfully be convicted of three counts of child molestation, one for each fondling of a separate part of the victim's body. The court did not reach any punishment issue and did not hold that a defendant may be punished separately each time the victim is touched during an assault with intent to rape, as respondent suggests here. Respondent also relies on *People v. Harrison*, *supra*, 48 Cal.3d 321, in which the California Supreme Court held that the defendant, who had digitally penetrated the victim three times during a seven- to ten-minute attack, could be convicted of and punished for three counts of sexual penetration by a foreign object. (*Id.* at pp. 326, 334-338.)

Neither case supports respondent's argument, which appears to be that the trial court could have imposed punishment for both counts 15 and 16 if one count had charged appellant with attempted rape and the other had charged him with assault with intent to commit a felony, other than a sexual offense, which could form the basis for preventing the victim's escape. This simply was not the case here, where appellant was charged with attempted rape and assault with intent to commit a sexual offense. Thus, as attempted rape calls for the lesser sentence, we stay count 15. (See §§ 220, 261, 664; *People v. Pena*, *supra*, 7 Cal.App.4th at p. 1312.)

6. *Counts 2 and 12: One Burglary*

Appellant originally argued that because the burglaries in counts 2 and 12 charge the same offense, the sentence on count 12 should have been stayed. Because each count charged appellant with burglary of the same house, on the same date, we asked the parties to brief the question of whether appellant could properly be convicted of both burglaries in the first instance. We find that under the facts of this particular case, only one conviction for burglary is appropriate.

In this case, appellant entered the house and approached both Lala and Novart, making sexual comments and movements. Novart ran out of the kitchen into the backyard. Appellant continued his sexual actions and approached Lala, grabbing her and exposing his genitals. Lala then ran into the backyard, and appellant followed her there. Lala's dog went after appellant's feet, which scared him. He ran back into the house and out the front door.

Both parties relied upon *People v. Washington* (1996) 50 Cal.App.4th 568, and agreed that a single entry into a dwelling with the intent to commit a felony will result in a single burglary, while two separate entries into the same dwelling with the same felonious intent may result in two burglary convictions. (*Id.* at pp. 576-579.)

At trial the People did not argue that there were two entries, nor did respondent make that claim with respect to appellant's original contention that section 654 required the court to stay the punishment as to one of the counts. Now, in response to our recent request for letter briefs, respondent attempts to save the two convictions by arguing separate entries, each with felonious intent. However the record does not support a finding of two such entries. Because counts 2 and 12 were based upon a single entry and a single felonious intent, we find appellant was not lawfully convicted on both counts.[6]

The appropriate remedy for prohibited double conviction is to vacate one of the convictions, as well as the sentence imposed thereon. (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 494; cf. *People v. Cole*, *supra*, 31 Cal.3d at p. 582.) Because the trial court expressed the intent that the imposition of the concurrent sentence as to count 2 remain in the event of reversal, we vacate the conviction and sentence imposed as to count 12.

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6 Even if the People had alleged two entries, the second conviction would still be unsustainable. There was no substantial evidence to support a finding of felonious intent with respect to the second entry. The record is clear that appellant went inside a second time only to get away from the dog that was chasing him.

DISPOSITION

The judgment is modified by staying execution of the sentence imposed on counts 7 and 15. The conviction on count 12 and the sentence imposed thereon are vacated, and count 12 is dismissed. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections.

MOHR, J.*

We concur:

BIGELOW, P. J.

RUBIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.